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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY JOHN BOYLE FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an appeal from the judgment of Weatherup J whereby he dismissed the appellant's application for judicial review of the decision of the Secretary of State for Northern Ireland refusing to award compensation to the appellant under section 133 of the Criminal Justice Act 1988 and declining to exercise his discretion to grant compensation under an extra statutory *ex gratia* scheme.

Background

[2] The appellant was convicted on 14 October, 1977 at Belfast City Commission before His Honour Judge Brown QC, sitting without a jury, of one count of possession of firearms and ammunition with intent to endanger life, contrary to section 14 of the Firearms Act (Northern Ireland) 1969 and one count of membership of a proscribed organisation contrary to section 19(1) (a) of the Northern Ireland (Emergency Provisions) Act 1973. He was

sentenced to ten years' imprisonment on the first count and to two years' imprisonment on the second. The sentences were ordered to run concurrently. A suspended sentence of two years' imprisonment imposed in respect of an earlier conviction was activated and ordered to be served consecutively to the concurrent sentences of ten and two years' imprisonment. On 13 January 1978, the Court of Appeal dismissed the appellant's appeal against conviction and sentence.

[3] The allegation against Mr Boyle was that he had taken part in an IRA gun attack on police officers in Franklin Street, Belfast, on 27 May 1976. The case against him was based exclusively on admissions, said to have been made by him to two police officers during interviews that took place on 8 and 9 March 1977, to the effect that he had been giving cover to the gunman who had fired on the police officers. He was recorded as having denied that he had been involved in the actual firing of shots.

[4] Mr Boyle has always disputed that he made any admissions. He claimed that the police officers had written down things that he had not said. These claims were denied by the police. During cross examination in the course of the trial the two officers who had made a record of the fifth interview asserted vigorously that the notes of all interviews conducted by them (including interview five) had been made at the time that the interviews took place. They denied that notes had been prepared after the interview of the appellant. Judge Brown expressed himself as entirely satisfied of the truthfulness and honesty of the detectives and forthrightly rejected the appellant's claims that he had not made the relevant confessions.

[5] In April 2001 the Criminal Cases Review Commission referred the appellant's convictions to the Court of Appeal, exercising its statutory powers under Part II of the Criminal Appeal Act 1995. The reference was prompted by new evidence that had been made available by scientific developments in electrostatic detection apparatus (ESDA) testing techniques. Kim Harry Hughes, a forensic scientist, had provided a report on the ESDA examination of the interview notes.

[6] The case was heard as a fresh appeal. In an *ex tempore* judgment delivered on 29 April 2003, Carswell LCJ held that the convictions were unsafe and they were duly quashed. He identified the fifth interview as that during which the relevant admissions were made. The admissions relied on by the Crown during the trial were contained in the notes of that interview and, according to the text of those notes, were as follows: -

> "We continued to question subject about his admissions to us, about being in the Provisionals and he agreed and said 'I am making no statement'. When asked why he did not want to

> make a statement to clear the whole lot up he replied 'I can't make a statement I am an officer'. We continued to question the subject and he then said 'Sure you said yesterday that I am the QM'. When the subject was asked if this was true he agreed.
>
> …
>
> We continued to question subject about this incident and he admitted 'I only done cover with a pistol while another man fired an Armalite'."

[7] The Lord Chief Justice summarised the crucial part of Mr Hughes' report in the following passage:-

> "Having considered his report we are content to accept it, as agreed by the Crown and, having looked carefully at the findings which he has recorded, it appears that there is a basis for his conclusion that there must have been another version of the interview note of interview five. We do not base this so much upon the absence of certain passages, which may perhaps at least be explicable by notes having been made on a different surface in the time when those portions were recorded, but what we consider is of substantial significance is verbal differences between the recorded interview and the impressions which were found by Mr Hughes on examination. These are not substantial matters and they do not bring in any other matter which was in itself damaging to the case of the appellant, and we should make that clear that there is no question in this case of matters apparently having been written in which damn him and which are not contained in the impressions. But they vary in certain minor respects in wording which cannot be accounted for, in our opinion, by anything appearing or explicable from the impressions and accordingly we accept the conclusion that Mr Hughes advanced that there appears to have been a different version of interview five in existence at some time."

[8] Carswell LCJ then considered the effect of Mr Hughes' evidence on the case that had been made against the appellant on trial. He said: -

> "[6] No doubt if the police officers had accepted that there was a rough version, as has been mooted, which were then rewritten faithfully as a correct record of what was actually said in the interview, the case would have taken one turn. But the way that the officers were asked about it they maintained quite clearly, and this appears in several places in the transcript, that the notes of the interview were made throughout the interview and in their own phrase "at the time," and accordingly they have committed themselves in evidence saying that the interview notes were all taken as the interview progressed and did not resile from that.
>
> [7] If it now appears, as it does, that that cannot be correct, that immediately raises the question whether the credibility of the officers could have been attacked by this side door, legitimately enough by Counsel at the trial. One cannot say at this stage what view the judge would have taken of that. He might have taken the view that it had fatally undermined their credibility and removed the evidence from the area of proof beyond reasonable doubt to some lesser area, or he might have said that he nevertheless accepted that the evidence was reliable in substance and that the interviews reflected what was said. We are not in a position to say that and we simply could not say at this stage that the judge would necessarily have reached the same conclusion if he had known of the rewriting of the interviews and the matter had been pursued in evidence before him.
>
> [8] This brings us to a conclusion very similar to that which we reached in the case which was cited to us of the decision of this Court in 1999 *R v Gorman and McKinney* where we said: -
>
> > "Unlike some other reported cases the evidence of rewriting does not show the inclusion of any material which was to the detriment of either appellant nor did the fresh

> evidence afford direct and irrefutable contradiction of considered testimony given by police officers about the circumstances in which rewriting took place. There might well be an innocent explanation of each instance of rewriting if the evidence were before us. In the absence of satisfactory explanations for the rewriting of interview notes, we cannot be satisfied beyond reasonable doubt that the judge's conclusion would have been the same if the issue had been explored that the fresh evidence might have led to a different result in the case and we cannot regard the convictions as safe".
>
> [9] We consider that, disregarding the question of material which appears in the interview notes and not in the impressions upon which Mr Treacy relied, the case comes very close to that of *Gorman and McKinney* and that the same principles apply and because we are satisfied that there is at least a prima facie case that the notes were rewritten, we cannot regard the conviction as safe. We shall accordingly allow the appeal and quash the conviction."

[9] Following the quashing of his conviction, the appellant sought judicial review of the DPP's decision not to prosecute for perjury the two police officers who had made the interview note. That application was refused by Girvan J at first instance, a decision subsequently upheld by Court of Appeal in a judgment delivered on 28 April 2006.

Section 133

[10] Section 133 of the Criminal Justice Act 1988 was enacted to give effect to article 14 (6) of the International Covenant on Civil and Political Rights 1966 (1977) (Cmnd 6702) an instrument signed and ratified by the United Kingdom. Article 14 (6) provides: -

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such

> conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

[11] Two immediately obvious aspects of the article are relevant to the present appeal. The first is that there must be a new or newly discovered fact which leads to the reversal of the conviction. Secondly, it must be established conclusively that this fact had caused a miscarriage of justice. The latter of these prompts the question whether the phrase 'miscarriage of justice' means something more than having been wrongly convicted, although, for reasons that I shall explain, I do not consider that a final conclusion on that issue is required in order to determine the outcome of the present appeal on the applicability of section 133 to the appellant's case.

[12] Section 133 (1) provides: -

> "Miscarriages of justice
>
> ***Compensation for miscarriages of justice***
>
> 133. - (1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to, his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted."

[13] As Lord Bingham of Cornhill pointed out in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, the only change from the language of article 14 (6) in this provision was to replace the word "conclusively" with the rather more familiar expression in domestic criminal law of "beyond reasonable doubt". It was unanimously accepted in that case that "the key to interpretation of section 133 is a correct understanding of article 14(6)". It was also accepted that the expression 'miscarriage of justice' in section 133 "describes a concept which is autonomous, in the sense that its content should be the same in all states party to the ICCPR, irrespective of the language in which the text appears".

[14] In an attempt to elucidate these issues, counsel in the *Mullen* case embarked on a close examination of the different expressions employed in the text of the Convention as it appears in other languages; the *travaux préparatoires* for the treaty; the general understanding of the meaning of "miscarriage of justice" within the Council of Europe; the scheme of article 14(6) and the purpose that it was intended to promote; the "authoritative" interpretation by the United Nations Human Rights Committee of that provision; and the commentary in the explanatory report on article 3 of the Seventh Protocol to the European Convention on Human Rights and Fundamental Freedoms, which was intended to bring the Convention into line with the ICCPR where there was significant difference between them.

[15] A sharp divergence of opinion emerged from the speeches of Lord Bingham and Lord Steyn as to the answer that these sources provided on the meaning of 'miscarriage of justice'. For the purposes of the present appeal, however, I do not find it necessary to choose between the powerfully reasoned opinions on either side of that particular argument. Both speeches contain a number of layers. In what I might describe as 'the anterior layer' they are in accord. This aspect of the decision is perhaps best introduced by referring first to the opinion of Lord Steyn. As he pointed out, successful appeals taken within time are excluded from compensation under article 14 (6) or its domestic counterpart, section 133. His conclusion from that (with which I am in respectful agreement) is that there was no overarching purpose in article 14 (6) of compensating all who are wrongly convicted. This fixes the context for the discussion about which cases come within the ambit of section 133.

[16] The first stage or layer concerns the proof necessary to establish that there has been a miscarriage of justice. This does not require a conclusion as to the meaning to be attributed to that concept, but rather a decision as to whether a miscarriage of justice (whatever it may mean) has been shown to have occurred. At paragraph 46 of his opinion, Lord Steyn focused on the requirement that the new or newly discovered fact must show that there has been a miscarriage of justice, observing: -

> "The requirement that the new or newly discovered fact must show conclusively (or beyond reasonable doubt in the language of section 133) 'that there has been a miscarriage of justice' is important. It filters out cases where it is only established that there *may* have been a wrongful conviction. Similarly excluded are cases where it is only probable that there has been a wrongful conviction. These two categories would include the vast majority of cases where an appeal is allowed out of time."

[17] It seems clear that Lord Steyn was here indicating that only those who *ought not to have been convicted* come within the ambit of section 133. On my understanding of Lord Bingham's opinion, he did not disagree with that view for at paragraph 4 he said: -

> "The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials."

[18] The irreducible minimum that an aspirant for compensation under section 133 must establish therefore is that he should not have been convicted. That proposition underpins the decision of the Divisional Court in England and Wales in *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855(Admin). In that case the claimant was convicted of raping his wife. Subsequently the Court of Appeal, on a reference by the Criminal Cases Review Commission allowed his appeal on the basis that since his conviction fresh evidence had emerged that showed that his wife had a propensity for telling lies. He was refused compensation under section 133(1) because the Secretary of State was not persuaded that his convictions had been quashed 'on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice'. Although the Divisional Court rejected the argument that the conviction had not been quashed as a result of a newly discovered fact, it concluded that, since the claimant could not establish that, if his wife's propensity to tell lies had been known at the time of his trial, he would not have been convicted. At paragraph 25 of his judgment, Lord Phillips CJ, after quoting from the same paragraph of Lord Bingham's speech that I have referred to in the preceding paragraph, said: -

> "Lord Bingham, in the passage of his judgment that we have set out above, considered two different situations, each of which he considered fell within the description of 'miscarriage of justice' in section 133 of the 1988 Act. The first is where new facts demonstrate that the claimant was innocent of the offence of which he was convicted. In such circumstances, it is possible to say that if the facts in question had been before the jury, he *would* not have been convicted. The second is where there were acts or omissions in the course of the trial which *should* not have occurred and

> which so infringed his right to a fair trial that it is possible to say that he was 'wrongly convicted'. In such circumstances it is appropriate to say that the claimant *should* not have been convicted. This is the situation that Lord Bingham had in mind when he spoke of someone who *should* not have been convicted."

A new or newly discovered fact

[19] For the Secretary of State, Mr McCloskey QC argued that Mr Boyle's conviction had not been quashed on the basis of a new or newly discovered fact. He suggested that the Court of Appeal had not made any findings of fact in respect of the new evidence. It was concerned only with the safety of the conviction and it was unnecessary, Mr McCloskey claimed, for the court to make a finding on the evidence of Mr Hughes. It sufficed that this created a doubt about the safety of the conviction.

[20] I do not accept this argument. It is quite clear, in my view, that the quashing of the conviction was the result of a newly discovered fact *viz* the detection of another version of the note of the fifth interview. Even if the Court of Appeal had not made a finding to that effect, it is beyond dispute that this newly discovered fact led to the reversal of the conviction. In any event, I am satisfied that the court *did* make a factual finding because it said, "there is a basis for [Mr Hughes'] conclusion that there must have been another version of the interview note of interview five". In my judgment, this was a finding of fact.

Has the newly discovered fact caused a miscarriage of justice?

[21] As I have said, it is necessary for the appellant to establish that he should not have been convicted in order to qualify for compensation under section 133. On this issue the terms of the judgment of the Court of Appeal in quashing his conviction are critical. Its judgment was that the appellant's conviction was unsafe. It did not state that the appellant should not have been convicted. Indeed, the judgment clearly indicated that it was possible that the trial judge, if he had been aware of the evidence, might well have convicted - see paragraph [7] of the judgment quoted above at paragraph [5].

[22] It appears to me, therefore, that it is impossible for the appellant to assert that he should not have been convicted. One can certainly say that the police officers should not have given the evidence that they did. One may even say with confidence that the trial judge is bound to have taken an entirely different view of their credibility from the extremely favourable impression that he appears to have formed. But it is impossible to conclude that the appellant would not have been found guilty (much less that he

should have been acquitted) if evidence of the other version of the interview notes had been given.

[23] The finding of the Court of Appeal that the conviction was unsafe does not equate to a conclusion that the appellant should have been found not guilty at the original trial. It was precisely because the Court of Appeal felt unable to determine how the revelation of the different version of the interview notes would have affected the course of the trial and the verdict of the trial judge that it felt impelled to conclude that the safety of the conviction was not assured. I have therefore decided that the appellant is not entitled to compensation under section 133.

The ex gratia scheme

[24] Until April 2006 an ex gratia scheme was operated by successive Home Secretaries and Secretaries of State for Northern Ireland for the payment of compensation to certain of those who had been wrongly convicted but whose cases did not come within section 133 or article 14 (6) of ICCPR. Although that scheme has been discontinued, it is accepted that those such as the appellant who applied before April 2006 continue to be entitled if they meet the requirements that it contains. Compensation under this scheme was payable on terms outlined to the House of Commons in a written answer by the then Home Secretary, Mr Douglas Hurd, on 29 November 1985. These are the relevant passages from the statement: -

> "There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.
>
> In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a free pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following

> the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations."
>
> [He then set out article 14 (6) of ICCPR and continued …]
>
> "I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.
>
> There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

[25] In the present case, the Secretary of State for Northern Ireland's reasons for refusing to pay compensation under the ex gratia scheme were explained in a letter form the Northern Ireland Office of 2 February 2005. This stated that the judgment of the Court of Appeal contained no findings or conclusions about the conduct of the police that was sufficient to warrant the assessment that they had been guilty of 'serious default'.

[26] In *Re McFarland* [2004] 1 WLR 1289, Lord Bingham said that on the question of what constituted 'serious default' for the purposes of the ex gratia scheme, the Secretary of State should be guided by the court's assessment of that issue. At paragraph 16 he said: -

> "… the Secretary of State … had properly to be guided by the judgment of the court which quashed the conviction. It would not generally be open to him to treat as minor what the court had treated as serious, or vice versa. He had to take his cue from the court."

[27] In dealing with the issue of serious default Weatherup J said at paragraph [39] of his judgment: -

> "That there was default on the part of the interviewing officers is beyond question. The Court of Appeal stated that it appeared that their evidence that the interview notes had been made at the time of the interviews could not be correct. However the Court of Appeal did not conclude that this amounted to "false testimony" or perjury. The Court compared its conclusion to that in *R v Gorman and McKinney* where it was stated that there might well be an innocent explanation of each instance of re-writing. However no explanation was before the Court of Appeal in either case and the convictions were quashed. Had there been perjury there would clearly have been serious default. The basis of the challenge to the Secretary of State's decision is irrationality. However it was not established that there had been perjury and the Secretary of State was entitled to conclude that the default of the police officers was not "serious". It cannot be said, in the light of the terms of the judgment of the Court of Appeal quashing the conviction, that the decision of the Secretary of State that the conduct of the interviewing officers did not amount to serious default was irrational."

[28] It must be remembered, of course, that in this context the charge of irrationality on the part of the Secretary of State relates to his assessment of how the Court of Appeal regarded the behaviour of the police officers, not whether he considered that behaviour as amounting to serious default. It is true that the court did not condemn the police officers for having committed perjury but we do not consider that this can be interpreted as acquitting them of serious default. The police officers were not represented on the appellant's appeal against conviction. At the time that judgment was given, their prosecution for having given false evidence was an obvious possibility. It

would have been entirely inappropriate for the court to have expressed a pre-emptive opinion on that issue.

[29] Weatherup J appears to imply in the passage quoted at paragraph [23] that there might have been an innocent explanation for the re-writing, although this is somewhat difficult to reconcile with his undoubtedly correct conclusion that default on the part of the police officers was established beyond question. In any event, whether an innocent explanation for the re-writing was feasible, it is impossible, in my judgment, to conceive of an innocuous reason that the officers should have clung tenaciously to their account in evidence that there had been only one version of the interview notes. It appears to me that once one has concluded that there was default on the part of the police officers (as did the learned judge) it is not possible to characterise that default as other than serious.

[30] In *Mullen* Lord Bingham said that that the Secretary of State must enjoy some latitude in the administration of the ex gratia scheme, and Weatherup J relied on this dictum in concluding that the minister's conclusion that serious default had not been found withstood the irrationality challenge. Of course, Lord Bingham's reference to this was in a different context from the present *viz* whether the Home Secretary's decision not to provide compensation even though there had been serious default could be upheld on the basis that Mullen had not denied his guilt of extremely serious crimes. The examination in the present case of the rationality of the Secretary of State's decision takes place within a narrower framework. Here, one is looking at his assessment of the level of seriousness of the police officers' default as it emerges from the judgment of the Court of Appeal. In my view, although the court did not explicitly state that the default was serious (and I have explained why the court might have felt some reticence in doing so), what appears unmistakably from its judgment is that the resolute adherence of the police officers to their account on a matter of considerable importance in the appellant's trial constituted clearly serious default.

[31] I would therefore allow the appeal against the judge's finding in relation to the Secretary of State's conclusion on the question of the serious default of the police officers. That result would not inevitably lead to a finding that the appellant is entitled to be compensated under the ex gratia scheme since it remains necessary for the Secretary of State to consider whether he was satisfied that the appellant had been wrongly convicted as a consequence of that serious default.

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY JOHN BOYLE FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Girvan LJ

Campbell LJ

[1] I would allow the appeal to the extent suggested by the Lord Chief Justice.

[2] The judgment of the Court of Appeal on the reference from the Criminal Cases Review Commission does not establish that the appellant should not have been convicted. The Court goes no further than to say that it could not be satisfied that the trial judge would have reached the same conclusion had he been in possession of the information that is now available about the rewriting of the interviews. Accordingly, the appellant does not come within section 133 of the Criminal Justice Act 1988.

[3] I consider that there was serious default on the part of the officers in maintaining at the trial that the notes were not re-written and that the decision of the Secretary of State under the *ex gratia scheme* to the contrary is irrational.

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JOHN BOYLE FOR JUDICIAL REVIEW OF A DECISION OF THE SECRETARY OF STATE

GIRVAN LJ

[1] The appellant founds his claim to compensation on two separate bases. Firstly, he claims that compensation is payable to him under section 133 of the Criminal Justice Act 1988. He argues that he satisfies the statutory conditions for compensation. Alternatively, he argues that the Secretary of State was bound to pay him compensation under the relevant ex gratia scheme which was still in force at the relevant time although that scheme has since been wound up.

[2] If a citizen has a statutory right to compensation that is his entitlement and he is not dependent on the exercise of a discretionary power by the Executive. Thus logically it is necessary to first determine whether the appellant does indeed fulfil the statutory conditions which must lead to the payment of compensation if they are satisfied.

[3] Mr McCloskey QC on behalf of the Secretary of State sought to argue that even within the framework of section 133 of the 1988 Act the Secretary of State may exercise a margin of appreciation in determining whether new or newly discovered facts show beyond reasonable doubt that there has been a miscarriage of justice. This argument, however, must be rejected. The question whether a citizen fulfils the statutory criteria for compensation is a question which the court must determine in the event of dispute. The claimant must prove his entitlement and if his claim is contested by the Secretary of State it is for the court to determine whether the claimant has proved his entitlement. This is to be contrasted with the function of the Secretary of State in the context of the extra statutory scheme which calls for the exercise of a judgment by the Secretary of State as to whether the policy should be applied. The question whether the Secretary of State has reached his decision in the correct manner having regard to the proper considerations

falls to be determined by an application of the well recognised judicial review principles.

[4] Mr McCloskey correctly argued that there are five qualifying conditions to be fulfilled by a claimant. Firstly, he must show that he has been convicted in respect of a criminal offence. Secondly, he must show that his conviction was reversed or he was pardoned. Thirdly, such reversal or pardon must be based on the ground of a new or newly discovered fact. Fourthly, such fact must show beyond reasonable doubt that there was a miscarriage of justice. Fifthly, the claimant must show this beyond reasonable doubt. The Secretary of State accepted, as he was bound to, that the first and second conditions were clearly fulfilled. He did not, however, accept that any of the other conditions was satisfied.

[5] Mr McCloskey's argument that there was no fact or newly discovered fact that led to the reversal of the appellant's conviction must fail. The evidence contained in the report of Mr Hughes, an expert forensic document examiner, was not challenged by the Crown. The Crown had a full opportunity to proffer contradictory expert evidence if it was available and could have sought leave to adduce evidence to persuade the court of the safety of the convictions. No doubt advisedly it did not do so. In setting aside the conviction the Court of Appeal proceeded on the undisputed basis that there undoubtedly was another version of the interview notes in respect of the fifth interview Mr Hughes' conclusion that there were indentations present in the relevant documents pointing to the existence of an earlier version of interview notes was accepted as not in question. The evidence pointed to the existence of a new fact unknown to the trial court and one in fact denied in the Crown evidence. The Crown position was maintained in the first unsuccessful appeal. The discovery of indentations after the trial demonstrated the incorrectness of the Crown evidence adduced before the trial court. The fact that incorrect evidence was given by Detective Constables Briggs and Logan was in itself a new relevant fact. It was the discovery of the indentations and the inferences to be drawn from them and the discovery of the incorrectness and the misleading nature of the evidence of the relevant police officers that led to the quashing of the convictions. Accordingly the third condition was satisfied.

[6] The problematic question in this case is whether the claimant satisfies the fourth and fifth conditions. The question whether he does so depends on the proper interpretation of section 133 when it speaks of the newly discovered facts showing beyond reasonable doubt that there has been a miscarriage of justice. The decision of the House of Lords in R (Mullen) v Secretary of State [2004] 3 All ER 65 clearly establishes that where an admittedly guilty person is convicted in a trial properly conducted in itself he cannot establish a miscarriage of justice by pointing to a serious irregularity in the manner of his apprehension and unlawful abduction from another

country effected to enable him to be tried in the United Kingdom. There must be a failure in the trial process before a miscarriage of justice could be said to have occurred. Lord Bingham put the position thus:

> "In quashing Mr Mullen's conviction the Court of Appeal (Criminal Division) condemned the abuse of executive power which had led to his apprehension and abduction in the only way it effectively could. But it identified no failure in the trial process. It is for failures of the trial process that the Secretary of State is bound, by section 133 of the 1988 Act and Article 14(6) of the International Convention on Civil and Political Rights to pay compensation. On that limited ground I would hold that he is not bound to pay compensation under section 133."

The majority in the House based its decision on that ground. Thus the narrow ratio in Mullen appears to be that before a miscarriage of justice can be said to have occurred there must have been a failure in the trial process. In the absence of such a failure a claimant does not overcome the first hurdle. Since the claimant in that case fell at the first hurdle the House did not have to come to a concluded view as the full meaning of a miscarriage of justice for the purposes of the section. The difficulty in the Mullen decision lies in the fact that there was a marked difference of view between Lord Steyn and Lord Bingham in relation to the proper approach to the interpretation of a miscarriage of justice for the purposes of section 133.

[7] Lord Steyn's analysis led him to the conclusion that for the purposes of section 133 a claimant must not merely prove that there was a failure in the trial process but he must also demonstrate that he was clearly innocent. Lord Rodgers agreed that the appeal could be decided on the basis put forward by Lord Bingham but for his part he accepted the arguments advanced by Lord Steyn. Lord Walker recognised the strength of Lord Steyn's arguments but would go no further than allowing the appeal on the ground identified by Lord Bingham. Lord Scott did not consider it strictly necessary for the disposal of the appeal to express a concluded view on whether section 133 had the wider scope supported by Lord Bingham and declined to do so. He concluded his speech by agreeing with both Lord Bingham and Lord Steyn

[8] Lord Bingham said that he hesitated to accept Lord Steyn's approach. While he was not purporting to conclusively determine the proper interpretation of section 133 the reasons he gave for hesitating to accept the approach of Lord Steyn are persuasive though, as Lord Rodgers and Lord Walker pointed out, Lord Steyn's reasoning is itself powerful. The fact that

two such powerful sets of arguments could be so persuasively put forward demonstrates that the proper interpretation of section 133 is a matter of difficulty and doubt. It is, however, evident that the two approaches cannot be reconciled. In the present case if Lord Steyn's analysis is correct the appellant must fail under section 133 since he has not established and cannot prove his innocence beyond reasonable doubt. If Lord Bingham's approach is correct then in the circumstances of this case he may be and, in my view, is entitled to succeed. In the absence of a clear decision as to the proper interpretation of section 133 this Court must seek to construe the section, taking fully into account the obiter views expressed by their Lordships in Mullen.

[9] In his letter of 2 February 2005 Mr Mercer acting on behalf of the Northern Ireland Office Criminal Justice Policy Division stated that it remained the Secretary of State's view that the appellant's conviction did not satisfy the tests suggested by either Lord Steyn or Lord Bingham and accordingly his claim failed to establish that a miscarriage of justice had occurred. In his affidavit of 15 January 2007 Mr Mercer stated that since the decision in Mullen the issue of innocence is a live issue. This points towards an application of Lord Steyn's approach.

[10] While hesitating to accept Lord Steyn's reasoning Lord Bingham did not formulate precisely the test for determining what is meant by a miscarriage of justice for the purposes of section 133. He did, however, refer with apparent approval to paragraph 23 of the explanatory report of the Committee of Experts on Human Rights which suggests that a miscarriage of justice occurs where there is "some serious failure in the judicial process involving grave prejudice to the convicted person".

[11] For my own part I consider that Lord Bingham's hesitation in not accepting Lord Steyn's stringent requirement of proof of innocence was justified. It is worth noting that Lord Bingham and Lord Steyn both refer to the French text of the International Convention of Civil and Political Rights and drew differing conclusions. It is clear that French and English together with Spanish, Chinese and Russian represent equally binding language versions of the Convention. The French language version uses the words *erreur judiciaire* where the words *miscarriage of justice* appear in the English language version. In Lord Bingham's view the French version does not point to a requirement of proof of innocence. Lord Steyn, on the other hand, considered that it was a technical expression indicating a miscarriage of justice in the sense of conviction of the innocent. He called in aid the provisions of article 626 of the *Code de Procédure Pénale*. Since they came to differing views on the French text it may be instructive to examine a little more closely the French law in this context.

[12] The term *erreur judiciaire* is defined by Gérard Cornu in his Vocabulaire Juridique (7th Edition) as "*une erreur de fait commise par une juridiction de jugement dans son appreciation de la culpabilité d'une personne poursuivie.*" The French term is in fact as elastic as the meaning of the English phrase miscarriage of justice and on occasions is used to refer to the wrongful conviction of the innocent. Both in English and in French the question arises as to what is meant by referring to the conviction of an "innocent" person. Under French law after resort to the appellate procedures and any relevant *pourvoi en cassation* the procedure for challenging a conviction lies by way of a *demande en révision* a procedure provided for in Title II of Book III of the Code. In the original version of articles 443-445 of the Code there were three possible grounds for setting aside the conviction of a defendant (viz. irreconcilable convictions of two accused persons, the discovery that an alleged murder victim was either not dead or never existed and perjury by at least one witness leading to a conviction). By a law of 8 June 1895 a fourth ground was added namely the discovery of a fact that established the innocence of the defendant. A further reform in 1898 changed the requirement that the fact proved the innocence to the defendant to reference to a fact *de nature à faire naître un doute sur la culpabilité du condamné* (that is to say, a fact of a kind to give rise to a doubt about the guilt of the convicted person). The present Code in article 622 sets out the modern four grounds for a *révision.* These largely reflect the same four grounds. The fourth ground remains the requirement to show a new fact or element unknown to the trial or appeal court of a kind to give rise to a doubt as to the guilt of the accused.

[13] When the Criminal Chamber of the *Cour de cassation* considers that the *demande* is well founded it sets aside the conviction. If the matter is capable of being retried the matter is remitted for a fresh trial. If the defendant is acquitted on the retrial his innocence is thereby established. It is to be noted that he is entitled to be acquitted (and thus have his innocence established) if the case is not proved beyond reasonable doubt. It is not for the defendant to prove beyond reasonable doubt that he is innocent of the crime in respect of which he was originally convicted. Under article 626 provision is made for compensation when a convicted person is "*reconnu innocent en application du present titre*". Lord Steyn has read that provision as requiring proof by the defendant of his innocence. That, however, is not what is required under the French procedure and is based on a misapprehension of the true import of article 626 and it gives to the words *reconnu innocent* a meaning which they were not intended to have. Where a conviction is quashed and he is subsequently acquitted he is *reconnu innocent* in consequence. When the defendant's conviction is annulled and he cannot be retried then the annulment of the conviction leads of itself to the establishment of his innocence. The conviction having been annulled, there is nothing to establish the guilt of the presumed innocent person. This becomes clear from the penultimate paragraph of article 626 which provides : "*Si le demandeur le requiert, l'arrêt ou le jugement de révision* ***d'où résulte l'innocence*** *du condamné*

*est affiché dans la ville où a été he prononcée la condamnation…"*Accordingly, contrary to Lord Steyn's view, French law lends weight to Lord Bingham's approach. Of course, French law cannot of itself determine the proper approach to the interpretation of the domestic law provision applicable in this country and in R v May [2008] UKHL 28, R v Green [2008] UKHL 30 and the Crown Prosecution Service v Jennings [2008] UKHL 29 the House of Lords rejected recourse to foreign law to interpret a domestic law provision even where it was enacted to give effect to an international obligation. Nevertheless, since the French language text is of equal weight to the English language text consideration of the French legal context of the relevant term is appropriate in the quest for determining the proper ambit of the concept of miscarriage of justice in the Convention.

[14] The key to the proper approach to the concept of a miscarriage of justice under section 133 lies in the recognition (to which effect is given by French law) that once a conviction is quashed in consequence of newly discovered facts that led to an erroneous decision the acquitted defendant falls to be considered to be a person presumed innocent whose presumed innocence cannot be gainsaid by reliance on evidence that falls short of establishing his guilt. If a retrial is possible then if he is acquitted on retrial his innocence is established. It is not for him to prove it. If he cannot be retried then the quashing of the conviction leads to the conclusion that his guilt has not been proved and he falls to be considered as not guilty of the offence and thus innocent in the eyes of the law. To demand of a defendant proof of his innocence is to impose in many instances an impossible task, a task that turns on its head the presumption of innocence. Lord Bingham cited with approval the view expressed by Van Dijk and Van Hoof in Theory and Practice of the European Convention on Human Rights (3rd Edition) 689 who wrote:

> "In what follows the explanatory report (para 25 of the report of the Committee of Experts in relation to art 14(6) of the ICCPR)seems to imply that reversal on the ground that new facts have been discovered which introduce a reasonable doubt as to the guilt of the accused is not enough. In our opinion this interpretation would be too strict especially in view of the right to be presumed innocent, laid down in Article 6(2) of the Convention which implies that reasonable doubt and clear innocence should lead to the same result."

[15] The approach of Lord Phillips in R(Clibery) v Secretary of State for the Home Department [2007] EWHC (Admin) 1855 is not on my reading of his judgment inconsistent with the conclusion which I have reached. He said:

> "Lord Bingham, in the passage of his judgment that we have set out above, considered two different situations, each of which he considered fell within the description of 'miscarriage of justice' in section 133 of the 1988 Act. The first is where new facts demonstrate that the claimant was innocent of the offence of which he was convicted. In such circumstances, it is possible to say that if the facts in question had been before the jury, he *would* not have been convicted. The second is where there were acts or omissions in the course of the trial which *should* not have occurred and which so infringed his right to a fair trial that it is possible to say that he was 'wrongly convicted'. In such circumstances it is appropriate to say that the claimant *should* not have been convicted. This is the situation that Lord Bingham had in mind when he spoke of someone who *should* not have been convicted."

The facts and circumstances of the present case in my view fall clearly within the second situation of which Lord Phillips speaks. The actions of the police witnesses should not have happened and they so tainted the prosecution case that it can be said that he should not have been convicted on that evidence. It is thus right to consider he was on that evidence wrongly convicted

[16] The appellant in this case satisfied the requirements of section 133. He had been wrongfully convicted. A retrial was considered unnecessary or inappropriate. The ordinary legal process had not prevented the court from being misled on key evidence central in its consideration of the case. The appellant served a lengthy prison sentence on foot of a conviction based on tainted evidence and the suppression of relevant information. He suffered serious prejudice namely many years in prison as a result of a failure in the process. In the light of his acquittal by the Court of Appeal he is to be presumed innocent of the charges on which he is convicted. Following the words approved by Lord Bingham (see para [10] above) there was a serious failure in the judicial process involving grave prejudice to the appellant. I conclude that he is entitled to compensation.

[17] Since the appellant is entitled to succeed under section 133 the question whether he would be entitled to recover compensation under the ex gratia scheme does not arise. If section 133 falls to be construed in the manner proposed by Lord Steyn I consider that the actions of the police officers in this case unarguably fell to be considered as serious default for the purposes of the scheme and that he should qualify for compensation under the scheme if he is not entitled to succeed under section 133.

[18] In Mullen Lord Scott considered that there was in fact little likelihood of the difference of view between Lord Bingham and Lord Scott resulting in different outcomes since in most cases where Lord Steyn's test would deprive a party of compensation but Lord Bingham would allow him compensation he would recover compensation under the ex gratia scheme. However, if section 133 were to be construed and applied in the manner proposed by Lord Steyn the abandonment of the ex gratia scheme would now result in a serious lacuna in the law in relation to the compensation of defendants who have suffered grave injustice as a result of convictions which should not have taken place. The abandonment of the scheme, thus, throws into sharper focus the real difference in outcome between the conflicting approaches and the need to arrive at a clear conclusion as to the correct test.